

No. 5378

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit 14

HONG CHOW DUCK,

Appellant,

vs.

JOHN D. NAGLE, as Commissioner
of Immigration for the Port of
San Francisco, California,

Appellee.

OPENING BRIEF FOR APPELLANT.

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STATEMENT OF THE CASE.

Hong Kun, father of the appellant, Hong Chow Duck, has been continuously in the United States for more than 45 years, with the exception that he made five trips to China. On the last trip to China, he left in December, 1919, and returned in January, 1921.

During this period of practically half a century, he has been peaceable and law abiding. He has never been arrested or charged with any crime, misdemeanor, or other offense, or misconduct, excepting that of conspiracy as to which he was acquitted by a jury.

During the whole of this time he has lived continuously in California—a greater portion of the time in San Francisco.

The shadows are lengthening for Hong Kun, and so in the evening of his life he sent and had his son, Hong Chow Duck, brought from China to San Francisco. The government admits that Hong Chow Duck is the son of Hong Kun.

It is uncontradicted that Hong Kun was one of the original members of the Sam Hing Company when it was organized in 1917, or about eleven years ago, and has continued to be a member of that partnership until the present time. The firm has, during the eleven years of its existence, continued to occupy its present location at 1040 Grant Avenue, San Francisco, California, and has, during all that time been actively engaged in the sale of groceries and provisions, doing a business of about \$70,000.00 per year.

Its capital is \$15,000.00 contributed by 30 members of the partnership, 12 of whom are active members and 18 of whom are not active partners. Each of the active partners receives the same salary of \$50.00 per month, including the manager. The rent is \$110.00 per month. Hong Kun was an active member from 1917 until the present time, with the exception that the firm classed him as an inactive member and he did not receive a salary from the time he left in December, 1919, until he returned from China in January, 1921, but during all the rest of the life of the firm he did receive a salary.

During the years 1922 and 1923, this salary was \$50.00 per month and is shown by the books of Sam

Hing Company, and by the returns of that company to the Treasury Department as indicated by copies of those returns in the files of the Sam Hing Company and by the letter of the Treasury official addressed to Sam Hing Company. The books of the company and the income tax returns both show Hong Kun to be an active member of the firm of Sam Hing Company.

It is also clearly shown by the testimony, and is nowhere contradicted, that Hong Kun is a salesman and delivered goods for his firm, the Sam Hing Company, and that his hours of duty were from 7 o'clock a. m. to 9 o'clock p. m.

On June 12, 1923, Hong Kun made an affidavit that he is the father of Hong Chow Duck, who was then in China; that Hong Kun had been a merchant for more than a year and that he made this affidavit to facilitate the coming into the United States of his said son, and he appears to have attached a photograph of his son to the affidavit for identification, and he sent the affidavit and photograph to his said son in China. Hong Chow Duck, the son, arrived in San Francisco on January 3, 1924. On January 7, 1924, Louie Hoy, manager of the Sam Hing Company, made an affidavit that Hong Kun was a merchant and had been for more than a year last past. These affidavits were filed with the immigration officials at San Francisco.

On March 21, 1924, Hong Kun, Hong Chow Duck, and Louie Hoy appeared before a special board at San Francisco with two white persons (Samuel Castro and Carmine Arnone) and testified in substance that

Hong Kun was then and had been for more than a year last past, a merchant and a member of the firm of Sam Hing Company, at 1040 Grant Avenue, San Francisco. These white persons were and are reputable white citizens of the United States, and enjoy a splendid reputation in San Francisco where they reside; they are engaged in the sale of merchandise as traveling salesmen for wholesale houses in San Francisco, and sold goods to the Sam Hing Company, and in this capacity knew Hong Kun and Louie Hoy, and their relation to the Sam Hing Company, and their work in connection with its business.

An inspector of this special board visited the place of business of the Sam Hing Company at 1040 Grant Avenue, San Francisco, and made a written report of the business of the company; how it was conducted, etc. The testimony of all of these witnesses before the special board was reduced to writing and it, with the report of the inspector and the finding of the board, appears to be a matter of record. Two of the members of the board later testified as we will subsequently show. The special board found that Hong Kun was a merchant and had been for more than a year prior to the entry of his son, Hong Chow Duck, and that Hong Chow Duck was entitled to enter the United States as the minor son of Hong Kun, a merchant, and the son was allowed to enter and he did enter.

Subsequently, Hong Kun brought into the United States another son who was not allowed to enter. Hong Kun and this son and others were indicted for conspiracy in bringing this second son into the coun-

try, but a *nolle prosequi* was entered as to the second son, Hong Chow Jung, and this son returned to China for the reason as stated by Mr. McNab, his attorney, and nowhere contradicted, that this second son, tired of his incarceration at Angel Island and desired to return to his mother in China and Hong Kun consenting and the government officials being willing, the proceeding was dropped and the second son returned to China.

On September 22, 1925, the United States Grand Jury for this district indicted Hong Kun (the father), Hong Chow Duck (the son), Louie Hoy (manager of Sam Hing Company), Samuel Castro and Carmine (white salesmen for San Francisco business houses) for conspiracy to defraud the United States and impede the due and legal execution of the laws of the United States respecting the entry into the United States of alien Chinese persons, that is to say, to wilfully and unlawfully bring into and cause to be brought into and to live and be located in the United States, Hong Chow Duck, a citizen and inhabitant of China, and "upon the pretense" that Hong Kun, the father, was a merchant although he was not a merchant and was a laborer and further alleged that this conspiracy included the following acts, namely:

The making of the affidavit by Hong Kun on June 12, 1923, sending it to China with the photograph and the bringing of his son from China; the making of the affidavit by Louie Hoy on January 4, 1924, the day after Hong Chow Duck arrived; the filing of these affidavits and the photograph with the immigration officials on January 7, 1924, and the testimony by Hong

Kun, Hong Chow Duck, and Louie Hoy before the special board on March 21, 1924, no mention being made in the indictment of any act by the two white defendants; the indictment alleging that these affidavits and this testimony was to the effect that Hong Kun was a merchant, but that he was not a merchant, but was a laborer then and for the period of the year prior to the making of the affidavit and the giving of the testimony.

When the conspiracy case was called for trial, the United States asked for and the Court granted a *nolle prosequi* as to the white defendants, and the case proceeded to trial before a jury, which rendered its verdict "not guilty" as to each of the defendants, Hong Kun, Hong Chow Duck and Louie Hoy.

The sole issue under the indictment, presented to the jury under the charge of the court and passed upon by the jury, was resolved into one question as to whether Hong Kun was a merchant or whether he was a laborer at and for one year prior to the time his son entered the United States. The verdict of "not guilty" is a finding that he was a merchant and not a laborer.

It is significant that it was not until after the jury found Hong Kun, Hong Chow Duck and Louie Hoy *not guilty* of said conspiracy that the immigration officials sought to have Hong Chow Duck deported upon the ground that he was not the son of a merchant, and after nearly three years had elapsed since his landing by the commissioner of immigration as the son of a merchant, after a most careful investigation and hearing. Ever since his landing the said Hong Chow

Duck has been attending the Presbyterian School and other schools where English is taught, fitting himself for trade. Shortly before the warrant of deportation was issued Hong Kun purchased for his son a small interest in a well known business house in San Francisco, the Canton Bazaar, and which interest the son still owns, and said son is now in the employ of said Canton Bazaar as a salesman at a salary of \$50.00 a month.

The testimony in the deportation proceedings against Hong Chow Duck includes all of the testimony given on behalf of the United States and on behalf of the defendants in the conspiracy trial.

It was taken down in shorthand, was transcribed and is in writing.

We will in the argument to follow review that testimony as briefly as possible as to every possible conflict or uncertainty, but before doing so we will set out what were the uncontradicted facts established by all of the testimony in this case.

ARGUMENT.

(1) Hong Kun came to the United States in 1881 and has remained here continuously ever since, with the exception of four trips which he made to China prior to 1919, a fifth trip which he made in December, 1919, returning in January, 1921.

(2) In 1917 he and other Chinese persons formed the co-partnership of Sam Hing Company, which has continuously transacted a grocery and provision busi-

ness at 1040 Grant Avenue, San Francisco, where it does the considerable business of \$70,000 per year or about \$200.00 per day.

(3) The firm has a capital of \$15,000, contributed by 30 members in equal sums of \$500.00 each, 18 of which partners are inactive and 12 of whom are active.

(4) Hong Kun was an active partner and drew salary as such, equal to the salaries of the other active partners, from 1917 until the present time, excepting the year of his last visit to China when he was classed by the firm as inactive.

(5) During the year involved, he was considered an active partner and his regular hours at work were from 7 o'clock a. m. to 9 o'clock p. m. for which he received the salary of \$50.00 per month.

(6) The Sam Hing Company duly reported to the Treasury Department that Hong Kun was a member of the firm during the fiscal years 1922 and 1923 and that Hong Kun was one of the active partners, that he received the salary of \$50.00 per month during these two years and participated in the profits equally with the other partners during one of these years and shared in losses as partner during the other year.

(7) That the special board found in March, 1924, that Hong Kun was a merchant, a member of the Sam Hing Company, and had been for more than one year prior thereto, and that his son Hong Chow Duck was entitled to enter the United States and he was allowed to do so and did so enter.

(8) That Hong Chow Duck immediately entered a school in San Francisco and continued his studies,

especially English, and continued his studies in another school up to the time of his arrest, and that his father purchased for him a partnership interest in another legitimate business concern in San Francisco, which the son still owns.

(9) We have mentioned the fact that the testimony in the deportation case as to Hong Kun's status of merchant or laborer is the same testimony which was given in the conspiracy trial indeed, by agreement, the witnesses were not recalled but their testimony given in the conspiracy trial as taken down in shorthand, transcribed and typewritten, was admitted in this deportation case. We submit the following as a fair analysis of that testimony:

(a) The status of Hong Kun as a merchant and member of the Sam Hing Company is thoroughly established and nowhere contradicted as above set out, and the only question in the deportation case arises under the alleged activities of Hong Kun respecting certain clam transactions.

(b) The whole of the alleged clam transactions of Hong Kun is contained in the testimony of 12 government witnesses and Hong Kun himself, given at the conspiracy trial. The government witnesses were Mrs. John Jussla, E. Jussla, John F. Geary, J. A. Lee B. W. Wondernick, A. L. Schacht, Mrs. Julia Arata, C. W. Raddertz, George Davies, Otto Ruf, John Galvin and Alexander Paladini. None of these witnesses ever saw Hong Kun dig clams and there is no testimony by any witness that he ever dug a clam in his life. The testimony of Mrs. Jussla, A. L. Schacht, Julia Arata, C. W. Raddertz, George Davies, Otto

Ruf, John Galvin and Alexander Paladini, all relates to periods either prior to or subsequent to the period here involved, namely, one year prior to January 3, 1924, when Hong Chow Duck landed in San Francisco, or one year prior to the making of the first affidavit by Hong Kun on January 12, 1923. Analyzed more in detail, Mrs. Jussla said Hong Kun rented her shack for four years prior to the time he was arrested and she does not know whether he lived in the house and could not say whether he was ever in the house in 1922 or 1923 and he may have had a home in San Francisco. E. Jussla, her son, said he visited Hong Kun's shack two or three times a week in 1923, but saw him mostly on Saturdays and Sundays and particularly around the duck hunting season in October, November, December and January and saw him there opening clams or doing nothing. This witness left at 7:30 in the morning and returned at 6:30 except on Saturdays and Sundays, when he returned at 2 o'clock in the afternoon. He thinks Hong Kun rented the shack in the latter part of 1922. John F. Geary, J. A. Lee, B. W. Wondernick, A. L. Schacht, C. W. Raddertz, George Davies and John Galvin, testified only that they saw Hong Kun in Alameda or on a train between Alameda and San Francisco, with two cans and two of them saw clams in the cans. This is so consistent with Hong Kun's testimony that we pay it no further attention excepting to note, as above mentioned, that most of them and particularly those who saw the clams, testified as to periods not here involved. Alexander Paladini bought clams from Hong Kun long prior to 1922. It is ap-

parent from the testimony of some of these witnesses, that Hong Kun visited the neighboring shack of his friend, Wing Lee, and we believe that it must be found by the department that the true relation of Hong Kun to the clams as disclosed by all of the witnesses, is as testified to by himself, as follows:

(c) Hong Kun, himself, testified that during the period here involved, he was never in a boat and never dug a clam; that Wing Lee was a long time friend of his and that when this friend had more clams than he could sell conveniently, Hong Kun sometimes sold some of these clams for Wing Lee, receiving a commission on the amount of the sales. This we believe the Court must find is the substance of the whole of Hong Kun's transaction respecting the clams.

Summarizing, therefore, we submit that this case presents the following situation: a Chinese person lawfully in the United States since 1881, is peaceable, orderly and law-abiding, and since 1917 has been continuously a merchant. On January 3, 1924, his son arrived from China and is entitled to remain, if his father is a merchant. The father's status as a merchant is established unless he is to be classed as a laborer because, being a merchant actually and under the law, occasionally he sold some clams for a friend and received a commission for so doing, on the amount of the sales.

AUTHORITIES.

From among the hundreds of opinions and decisions in the Federal Courts construing the treaties and laws relating to the entry of Chinese subjects into the United States, we think a few only need be cited.

We understand it to be conceded that if Hong Kun was a merchant and had been for more than a year prior to the entry of Hong Chow Duck, the latter is entitled to remain under the provisions of the treaties and statutes:

Cheung Sum Shee v. Nagle, 268 U. S., 336; 69 Law. Ed. 985.

Among the numerous cases holding that a merchant does not lose his status as a merchant by engaging in other business activities, we refer to *Wong Fong v. U. S.*, 23 C. C. A. 110; 77 Fed. 168.

In this case, Wong Fong was a member of the trading firm of Chow Kee & Co., and also leased a tract of land and employed a number of Chinamen to carry on the business of gardening, for which gardening activities the District Court held that he lost his status as a merchant and became a laborer, but the Circuit Court of Appeals held

“there is no evidence that the plaintiff in error did manual labor in conducting his business of gardening, or that he did anything other than to employ laborers, collecting accounts, and exercising a general supervision over his business. The evidence showing that he was a merchant, and not subject to deportation, the judgment must be reversed, and the plaintiff in error discharged from custody.”

The Circuit Court of Appeals also referred to its decision rendered by Mr. Justice McKenna in the case of *Lee Kan v. U. S.*, 10 C. C. A. 669; 62 Fed. 914. This *Lee Kan* case is also referred to by Mr. Justice Day in *Tom Hong v. U. S.*, 193 U. S. 517 in these words, "The opinion being delivered by Mr. Justice McKenna, then Circuit Judge, in which the subject was so fully considered as to leave little to be added to the discussion."

In the *Lee Kan* case, Mr. Justice McKenna reviewed the history of the statutes, including the language of Mr. Geary in the House of Representatives in presenting the bill to the House, which later became the law. We are concerned with these words:

"There is one other definition that we think necessary. The treaty permits 'merchants' to come into this country. We have no desire to restrict the movements of the mercantile class; but the trouble has been that men pretending to be merchants have asked for admission at New York and other places, have sworn that they had interest in stores established in those communities, have been admitted as merchants, and immediately developed into full-fledged laborers. We merely ask for a definition of the word 'merchant' which shall be broad enough to protect every man legitimately engaged in that industry, and narrow enough to prevent the designation being used as an instrument of fraud by a class that we do not desire. This amendment requires every Chinaman asking to be admitted into the United States, and who claims to have formerly resided here, to prove that for at least one year, at some fixed place of business within the Union, he was engaged in buying and selling merchandise. We do not demand that he shall have a dollar's worth of stock, or a thousand dollars' worth; we simply fol-

low the language of the treaty, and demand this protection to our own people.”

Mr. Justice McKenna then said:

“How efficient the amendment is for the purposes declared by Mr. Geary we shall hereafter show. It is incontestable that it was not directed at merchants any more than prior legislation was, or that it was not intended to regulate their methods of business, except so far as necessary to prevent evasions of the act. It was directed at laborers,—to prevent them from assuming a false character.”

We understand that this discussion by Mr. Justice McKenna was directed to the requirement that a merchant should conduct a business in his own name and that Lee Kan's name did not appear in the firm name under which he was doing business with others, but the heart of the case is the principle laid down which necessarily applies to all cases of this kind, namely, that the Act is construed to apply to the facts in each case, so as to actually carry out the real purposes of *Congress* ~~Courts~~ in passing the Act, namely, to prevent laborers from assuming false characters as merchants and thus remaining in the United States when they were not entitled to do so under the Treaties with China.

We think no one can read this decision and the decisions and opinions of the Supreme Court of the United States, without being impressed with the fact that the Courts have uniformly applied the facts to the Statutes and Treaties, with the ever present idea that the purpose of Congress was to prevent laborers from coming to the United States or remaining here,

under the guise of merchants, when they were not actually merchants.

We think it is equally true that a bona fide merchant is not to be held to have lost his status because of some innocent or inconsequential act, if this innocent act was consistent with his continuing status as a merchant, and was not of such a continuing and important nature that a fair minded person would say that he was not a merchant really, but was a laborer, and that his claim of the status of a merchant was a false pretense, made for the purpose of continuing his residence in the United States.

In this case Hong Kun is an inoffensive, law abiding, peaceable person, whose residence in the United States for nearly half a century has been without objection or ground of objection or complaint or criticism. A jury found that he is a merchant and the uncontradicted evidence throughout establishes a bona fide status as a merchant for more than ten years. For the Court to hold that the sale by him, for his long time friend, of a few clams on a few occasions, receiving his compensation as a commission on the amounts of the sales, would actually or legally deprive him of his status as a merchant is, to our minds, unthinkable. We believe that such a finding would be contrary to the decision of the Supreme Court of the United States, in the case of *Lau Ow Bew v. United States*, 144 U. S. 59, namely,

“nothing is better settled than that Statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possi-

ble, so as to avoid an unjust or an absurd conclusion.”

and also to the case of

Ow Yang Dean v. United States, 145 Fed. 801.

We have, therefore, the opinions of the Courts that this statute is to be construed in the light of its clear purpose, which is to prevent a laborer from coming into or remaining in the United States on the false pretense that he is a merchant, and we have the direction of the Supreme Court of the United States that it is to be so construed as not to lead either to an unjust or absurd conclusion. We submit that a finding that a merchant—a bona fide merchant—for a period of more than ten years and a bona fide co-partner in a business enterprise having a capital invested of \$15,000 and doing a business in selling groceries and provisions in San Francisco amounting to more than \$70,000 per year is not a merchant, but is a laborer, because he sold on commission a few clams for a friend, would lead to both an unjust and an absurd conclusion. We have not here the case of a man who labored and received wages for his labor, but we have a case of a bona fide merchant engaged in the usual and ordinary retail business of buying and selling groceries and provisions for ten years, at a fixed place of business in San Francisco, the place of business renting for \$110.00 per month—truly a very substantial business.

We do not contend that the department was estopped by the verdict of the jury in the conspiracy case; but we do contend that the same issue that was before the Department in the deportation proceeding was tried by that jury, and that the Department should

have regarded that decision as very persuasive, indeed, though not legally conclusive. The first reason is, that the decision is final so far the Court before whom the conspiracy case was tried, is concerned, and the Court is a co-ordinate branch of the Government of the United States. The Courts and the Executive Departments have, since the foundation of our Government, been careful—painstakingly careful—not to interfere with the proper functions of each other, but to give great weight to the findings of each other. It is the rule of the Courts not to disturb the findings of fact of an executive official, if there is any evidence to support that finding, and the uniform rule of courtesy prevails throughout the Executive Departments to give the same consideration to the findings of the Court, whether that be by the Court, or by a jury sitting with the Court.

The second reason is, that this was a jury of white citizens of the United States. The only defendants were the three Chinese, Hong Kun, Louie Hoy and Hong Chow Duck, and no partiality or favoritism was given to the Chinese by the jury.

We are mindful of the rule declared in the cases of *White v. Young Yen*, 278 Fed. 619; *Chin Shee v. White*, 273 Fed. 801, and kindred cases to the effect:

“It is not the function of this court in habeas corpus proceedings to weigh the evidence or go into the question of the sufficiency of the probative facts. It is sufficient in such a case, if there is some testimony to sustain the conclusion reached.”

In the instant case the evidence indisputably showed that Hong Kun was a bona fide merchant, and

a member of the firm of Sam Hing Company for one year next preceding January 3, 1924 the date of the entry of his son, Hong Chow Duck into the United States; and that Hong Kun did not during that year engage in the performance of any manual labor, except such as was necessary in the conduct of his business as such merchant.

The fact that Hong Kun at some other period of time may have engaged in the performance of manual labor which was not necessary to his business as a merchant is wholly immaterial, and should not weigh with the Court in determining the status of Hong Kun for the year next preceding January 3, 1924.

In conclusion, we submit that the evidence adduced showed that Hong Kun for one year next preceding January 3, 1924, was a bona fide merchant, and a member of the firm of Sam Hing Company; that during said period of time he did not engage in the performance of any manual labor, except such as was necessary in the conduct of his business as such merchant; and that there is no evidence to the contrary.

We respectfully submit that the judgment should be reversed; and that appellant should be permitted to be and remain in the United States as the son of a merchant.

Dated, San Francisco,
April 14, 1928.

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